UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELENA STURDZA, **Plaintiff,** **v.** **UNITED ARAB EMIRATES, et al.,** **Defendants.**	**Civil Action No. 98-2051 (CKK/JMF)**

REPORT AND RECOMMENDATION

Introduction

Ellen Sturdza ("Sturdza") is an architect who has battled in this lawsuit to establish that the design for the United Arab Emirates' new embassy was stolen from her. See generally Sturdza v. United Arab Emirates, 281 F.3d 1287 (D.C. Cir. 2002). After she lost in this Court and her appeal was pending, her lawyer, Nathan Lewin ("Lewin"), took an extraordinary step. He asked the Court of Appeals to appoint a guardian *ad litem* for his client, indicating that her behavior had become unreasonable and irrational. Lewin claims that, according to Sturdza's husband, "his wife's conduct and attitude had undergone substantial change during the course of this lawsuit, which in her [sic] view, had ruined her life." Motion for Appointment of Guardian *Ad Litem* at 3. According to Lewin, Sturdza's irrationality has taken many forms: incendiary allegations against her own lawyers, opposing counsel and the court, insisting that these unsupported allegations be included in pleadings filed in the Court of Appeals, submitting *pro se* pleadings despite the Court of Appeals's directive not to do so, and forbidding settlement discussions after the Court of Appeals had ruled in her favor. Id.

The most maddening examples of Sturdza's irrationality are, according to Lewin, her refusal to consent to the transfer of her files from the firm with which Lewin used to be associated to his new firm and to permit him to file a brief in the D.C. Court of Appeals even though the Court of Appeals for this Circuit certified a question to that court. Unfortunately for Lewin, Sturdza sees him as part of a conspiracy whose participants included the defendants, Judge Kollar-Kotelly, who once presided over this case, and even Sturdza's own husband. Lewin reports that Sturdza's husband told Lewin that "Sturdza has become completely consumed by these proceedings and has been unable to focus on anything else." Id. at 8.

The Court of Appeals referred Lewin's motion to this Court and the now presiding judge has referred it to me for a Report and Recommendation.

The behavior that Lewin reports is hardly news to me. I presided over certain aspects of this case when the matter was pending before Judge Kollar-Kotelly. We would frequently receive phone calls from Sturdza demanding that she be permitted to file pleadings even though Lewin represented her. My experience taught me that any judge who presides over this case will presides over two "lawsuits," the one between Sturdza and her opponents and the one between Sturdza and Lewin if Lewin remains Sturdza's counsel.

I held a hearing in this matter recently and I saw once again the behavior that Lewin reported. Sturdza is convinced that Lewin is opposing her and is in league with her opponents. She, therefore, believes that she must be permitted to proceed *pro se*. To that end, she has announced that she has fired Lewin. She is angry and certain that, by herself, she can undo and even avenge the wrongs done her by the defendants and Lewin.

Sturdza's Firing Lewin

The question of granting Lewin's motion is first complicated by Sturdza's firing of Lewin. A purely technical approach suggests that the firing of Lewin deprives him of "standing" since his relationship to this lawsuit is derivative of his relationship with Sturdza and she has exercised her unquestioned right to fire him. That ignores, however, that his motion for the appointment of the guardian *ad litem* antedates his firing and Lewin can say, with obvious justification, that Sturdza's firing of him is another irrational act that the guardian has to be permitted to set aside if Sturdza's case is not to self destruct. Lewin's firing is too hypertechnical a basis upon which to premise a refusal to confront the issues Lewin's motion presents. Indeed, if Sturdza is acting irrationally, and did so in firing Lewin, her behavior is all the more reason to confront the question Lewin presents rather than to run away from it.

Dimensions of the Motion

Rule 17(c) of the Federal Rules of Civil Procedure expressly grants the federal courts power to appoint a guardian *ad litem* for an "incompetent person." But, the rule must be read in conjunction with the statute that grants American citizens the right to "conduct their own cases personally or by counsel." 28 U.S.C.A. § 1654 (1994). In United States v. Dougherty, 473 F.2d 1113, 1122-23 (D.C. Cir. 1972), the Court of Appeals spoke of the ancient lineage of this statute and how it protects a fundamental right:

> The right of pro se representation was enacted by our very first Congress. The language declaring the pro se right is not qualified, see 28 U.S.C. § 1654. The statute was passed in a context of colonial tribunals largely manned by laymen, and of pioneer modes of thought emphasizing the virtues of common sense and self-reliance. Its constitutional aura is underscored by the proposal the very next day of the Sixth Amendment.

> In sum, whether or not the right of pro se representation has a constitutional foundation it is patently a statutory right, see § 1654; this right was not only conferred by Congress in 1789 but has wide reverberation in organic state law and was recognized by Congress as a fundamental right. We conclude that this right must be recognized if it is timely asserted, and accompanied by a valid waiver of counsel, and if it is not itself waived, either expressly, or constructively, as by disruptive behavior during trial.

Id. at 1122-23. Accord: O'Reilly v. New York Times Co., 692 F.2d 863, 867 (2nd Cir. 1982).

As the Daugherty case itself indicates, however, the statutory right to proceed *pro se* is not absolute but defeasible upon the showing of some other competing consideration. An expansive definition of the word "incompetent" threatens, however, to vitiate the statutory right to prosecute a case *pro se*, for it may deprive a person of a fundamental right without adequate justification. To prevent that result, a principled analysis of the meaning of the word "incompetent" requires a careful analysis of the deprivation the appointment of a guardian *ad litem* will cause against the interests advanced in support of that deprivation. In my view, that analysis requires a much greater showing than has been made by Lewin that Sturdza is "incompetent" as that word in Rule 17(c) is defined.

The Intended Deprivation

The analysis has to be begin with an honest appraisal of how complete the deprivation would be if Lewin's motion is granted. If a guardian is appointed and undoes Lewin's firing, the attorney client relationship that will then come into existence will be between Lewin and the guardian, subject, as the Court of Appeals reminded us,[1] to Judge Kennedy's supervision. From that point on, Lewin will answer to the guardian on all the fundamental issues in the lawsuit,

[1] Order June 6, 2002. Sturdza v. United Arab Emirates, No. 00-7279, 2002 WL 1285543.

including whether to settle it or prosecute. Moreover, given Sturdza's proclivities to file pleadings despite her representation by Lewin, Judge Kennedy may preclude her from doing so. Indeed, it is hard to understand how Judge Kennedy could not if the guardian was truly to be in control of the lawsuit and fulfill his responsibilities. Thus, Sturdza would become a spectator at her own lawsuit, without any control whatsoever over its prosecution and ultimate conclusion, reduced to the "infant or incompetent person" Rule 17(c) describes.

Lewin's Interest

Weighed against this invasion is, first, Lewin's interest. He has labored for five years in this case and his only hope of compensation and the recovery of his costs is the successful prosecution of this lawsuit by trial or settlement. Sturdza's self destructive behavior, to the point of not even permitting the briefing of the question the Court of Appeals certified to the D.C. Court of Appeals and refusing to even consider settlement after five years of litigation, threaten, to the point of imminent destruction, that interest. It is cold comfort to tell him that he has a lien for his fee and costs against any recovery. One third of nothing is still nothing.

I also do not think it fair to denigrate Lewin's interest as merely mercenary. While a good argument can be had in any gathering of Americans about whether contingency fees have or have not spawned litigation for the sake of litigation, no one can dispute that this case is an example of how they can work at their best. Thanks to a contingency fee, a woman who is not wealthy is able to assert her rights against what I have to suppose is a wealthy country. That happened only because a lawyer, motivated at least in part by a possible contingency fee, pursued her interests doggedly and effectively. Society has an important interest in continuing to encourage lawyers to do what Lewin has done in this case because it is the only way in which

people like Sturdza can assert their rights. A niggardly, supercilious attitude towards Lewin's interest because it "only" involves his fee defeats that important interest.

The Court's Interest

The Court also has an interest in the efficient use of its resources–an interest that will be advanced by the guardian *ad litem*, aided by Lewin, who knows the case so well, controlling the prosecution. That interest will suffer if Sturdza controls the case because she will certainly file pleadings that raise irrelevant issues that the Court will have to consider. Her refusal to permit Lewin to brief the issue certified to the D.C. Court of Appeals shows just how difficult the judicial management of this case may become.

The Defendants' Interest

Finally, the Court must consider defendants' interest in the appointment of a guardian *ad litem,* which is negligible. Defendants cannot really be heard to claim an entitlement to name their opponent and thereby hope to lessen Sturdza's chance of success.

Balancing the Competing Interests

When the competing interests are identified and analyzed, the appointment Lewin seeks cannot be justified. The resulting deprivation of Sturdza's right to control her lawsuit cannot, in my view, be justified by the interests competing against it in the absence of a much greater showing.

First, Sturdza's obsession with the lawsuit and her refusal to view it objectively, combined with her notion that "everyone is against her" is an unfortunately common syndrome

in the *pro se* litigation this Court sees nearly every day.[2] The Court has resources at its command to handle such litigation; it does so frequently. A substantial percentage of its cases are still filed *pro se* and in them extravagant and irrational assertions are often made. That the Court will have to use those resources and spend more time on this litigation than it would if Lewin remained counsel, answerable to a guardian *ad litem* rather than plaintiff, cannot justify the complete deprivation of Sturdza's rights that the appointment of a guardian *ad litem* will cause. O'Reilly, 692 F.2d at 869.

Second, while I refuse to demean's Lewin's interests as "merely financial," I cannot ignore that they are financial and thus easily trumped under a statute that prizes the citizen's right to represent himself and permits its deprivation only under circumstances that are much more compelling than Lewin presents.

Finally, there is another matter that Lewin ignores that deeply concerns me. There is already in place a sophisticated, statutory system that regulates the circumstances under which a guardian *ad litem* can be appointed. It is based upon the Uniform Guardianship and Protective Proceedings Act. See D.C. Code Ann. §§ 21-2001-2077 (2001). Notably, the required showing that a person is an "incapacitated individual," justifying the deprivation of her power to control her own affairs, is demanding. Section 21-2011(11) provides:

> Incapacitated individual means an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment

[2] Note how dangerous this syndrome can become. The last federal judge to be killed was killed by the father of a plaintiff who had protracted, Title VII litigation before the judge.

of a guardian or conservator.

While I am not ready to rule that a federal court is disabled from appointing a guardian *ad litem* unless there is compliance with the law of the forum[3] pertaining to such an appointment, the remarkable "end run" around this statute and the procedural protections it provides to the proposed "incapicated individual" suggests that acceptance of Lewin's proposal cautions against adopting a definition of incompetent in Rule 17(c) that is any less demanding than this statute. Yet, Lewin is not even suggesting that Sturdza meets the definition. She has submitted pleadings to the Court that are articulate and comprehensible, no matter how misguided Lewin thinks they are. She had appeared before me in Court and I cannot possibly describe this intelligent, albeit demanding, woman as incapacitated in the sense that I would not trust her with a checkbook or fear for her safety or health if a guardian was not appointed. Instead, she, like so many other *pro se* litigants, may have developed a "blind spot" in this litigation in that her obsession with it leads her to make wild allegations and claims she cannot support and to engage in what may be self destructive litigation behavior. I have seen that kind of behavior in many instances and I have not heard anyone argue, until now, that it justifies a court taking control of the litigation from the *pro se* litigant and placing it entirely in a guardian *ad litem*. I do not see how that result can be justified by any proper countervailing consideration particularly in light of Sturdza's statutory right to proceed *pro se.* In my view, the word "incompetent" in Rule 17(c) cannot be fairly defined to meet this situation.

I therefore recommend that Lewin's Motion for Appointment of Guardian *Ad Litem* be

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[3] Note that plaintiff is domiciled in Maryland which has a similar statute with a similar definition of the standard that has to be met before a guardian can be appointed. See Md. Code Ann. Est & Trusts § 13-201(c)(1).

denied.

Failure to file timely objections to the findings and recommendations set forth in this report may waive your right of appeal from an order of the District Court adopting such findings and recommendations. See Thomas v. Arn, 474 U.S. 140 (1985).

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JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated: